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No. 87-1866

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

WILLIAM G. MILLIKEN, et al.,
Appellants

v.

MICHIGAN ROAD BUILDERS ASSOCIATION, INC., et al.,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
OBJECT OF THE MOTION	1
STATEMENT OF FACTS AND COUNTERSTATEMENT OF THE CASE	2
A. Counterstatement of Statutory Background	2
B. Response to Appellants' Statement of Statutory Background	4
1. The Urban Markets Study	4
2. Executive Action	5
3. Legislative History	6
ARGUMENT	8
I. APPELLANTS' CHALLENGE TO THE STANDARD APPLIED BY THE COURT OF APPEALS IS WITHOUT MERIT	8
II. THE COURT OF APPEALS EXERCISED PROPER REVIEW OF THE DISTRICT COURT DECISION	10
III. APPELLANTS' ARGUMENT THAT THE COURT OF APPEALS ERRED IN CONSIDERING THE ABSENCE OF FINDINGS OF DISCRIMINATION AGAINST THE DISTINCT FAVORED MINORITIES IS WITHOUT MERIT	12
IV. THIS CASE AND THE *CROSON* CASE PRESENT DISSIMILAR ISSUES	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES	Page
Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1983)	11
Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983)	10
City of Richmond v. J.A. Croson Company, No. 87-998	14
Fullilove v. Klutznick, 448 U.S. 448 (1980)	7, 12
Kelley v. Southern Pacific Co., 419 U.S. 318 (1974)	11
Parham v. Hughes, 451 U.S. 347 (1979)	2, 8
Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1978)	2, 8
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	3, 8
United States v. Singer Manufacturing Co., 374 U.S. 174 (1962)	11
Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), reversed 476 U.S. 267 (1986)	10, 15

OTHER	
U.S. Const. Amendment XIV, §1	1
42 U.S.C. §§ 1981 and 1983	1
F.R.Civ.P. 52	10, 11
Public Act 1980, No. 428, Mich. Comp. Laws §450.771 et seq.	1
U.S. Sup. Ct. R. 16.1	1

OBJECT OF THE MOTION

Public Act 428, Mich. Comp. Laws §450.771 et seq., the Minority Owned and Woman Owned Businesses Act (hereinafter P.A. 428), "sets aside" a specified percentage of the expenditures of each principal department of the executive branch of the state of Michigan for allocation to minority-owned and woman-owned businesses. Appellees Michigan Road Builders Association, Inc., et al, challenged the validity of this statute, contending that P.A. 428 unlawfully discriminates in violation of the Fourteenth Amendment to the United States Constitution, as well as various federal statutes including 42 U.S.C. §§ 1981 and 1983. The district court for the Eastern District of Michigan, Southern Division, issued an opinion upholding the constitutionality of P.A. 428 and entered judgment in favor of Appellants. The district court opinion is reported at 654 F. Supp. 3 (E.D. Mich. 1986). The United States Court of Appeals for the Sixth Circuit held that P.A. 428 offends constitutional guarantees of equal protection and reversed the judgment of the district court. The Court of Appeals opinion is reported at 834 F.2d 583 (6th Cir. 1987).

Appellees bring this Motion to Affirm pursuant to United States Supreme Court Rules 16.1(c) and (d). Appellees move this Court to affirm the decision of the Sixth Circuit because the questions presented are insubstantial and/or because the decision of that Court is obviously correct and warrants no further review.

STATEMENT OF FACTS AND COUNTERSTATEMENT OF THE CASE

On its face, P.A. 428 employs classifications based upon race, ethnic origin, and sex; on its face, P.A. 428 discriminates in the awarding of state contracts based upon those suspect classifications. As this Court has repeatedly held, such classifications are "inherently suspect," *Parham v. Hughes*, 451 U.S. 347, 351 (1979), and presumptively invalid:

> Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an *extraordinary justification*.
>
> * * *
>
> Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination . . . [A]ny state law overtly or covertly designed to [grant a preference based upon sex] would require an *exceedingly persuasive justification* to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272-273 (1978).[1]

The record of this case fails to establish that there is any compelling, extraordinary, or exceedingly persuasive justification for the facially suspect classifications created by P.A. 428. Indeed, quite to the contrary, the record establishes that P.A. 428 emerged as the unfortunate result of legislative whim and momentum.

A. Counterstatement of Statutory Background

Contrary to the State's contention at page 3 of its Jurisdictional Statement, the recognition of underutilization of minority-

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[1]Emphasis added throughout unless otherwise indicated.

owned and women-owned businesses in state contracting was done wholely in the context of a concern that small businesses generally were not participating in the state's contracting and purchasing processes. Indeed, the House Bill that resulted in the challenged statute was introduced on March 15, 1979 as the "Michigan small and minority business procurement act." A substitute Bill was subsequently introduced which dealt only with minority and women-owned businesses.

P.A. 428 thus emerged as a device to obtain a greater representation of minority-owned and women-owned businesses in the state contracting arena. As Justice Powell noted in *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978):

> If the petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid. Preferring members of any group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

Nowhere is the State's true motive better illustrated than in its argument concerning the propriety of including Blacks, Hispanics, Orientals, Eskimos, and American Indians as members of the preferred class. The State admitted that it did not know how many Black, Hispanic, Oriental, Eskimo, American Indian, or women-owned businesses existed in Michigan. The State further admitted that it did not know how many, if any, Black, Hispanic, Oriental, Eskimo, American Indian, or women-owned businesses had ever requested bid documents from the State or had been awarded contracts by the State. *See* Court of Appeals opinion, p. 594-595, n.14. It is submitted that where a state does not know whether a particular class of businesses exist, or whether any class member has sought to do business with the state, or whether any class member has ever done business with the state, a statute granting a preference to such class can only have as its object a

desire to assure a certain percentage of the class as participants in the state's program. This the Constitution forbids.

B. Response to Appellants' Statement of Statutory Background

In their Jurisdictional Statement, Appellants have labored to create retrospectively a legislative history that does not exist. The documents and other evidence relied upon by Appellants do not establish that the State enacted P.A. 428 to remedy identified discrimination.

1. The Urban Markets Study

Appellants place considerable weight upon the report of a 1974 state-commissioned study by Urban Markets Unlimited, Inc. (hereinafter Urban Markets). See Court of Appeals opinion, p. 593. This study, however, contains no finding or suggestion of intentional racial discrimination. See Court of Appeals opinion, p. 593. Appellants stress that the report includes the statement that "state procurement practices are not equitable in the treatment of minority vendors," but examination of the context of that statement reveals that there is no mention of discrimination and that this conclusion is based upon a very undisciplined analysis of statistics. Indeed, the State Department of Management and Budget "found the methodology of [the Urban Markets report] faulty, producing 'unreliable' results." Record Exhibit 19(C), p. 6. The Urban Markets data[2] was later relied upon by the State because it was "the only current available data in this area — despite the [statement by the Department of Management and Budget] that it might not be fully representative." *Id.* p. 6. The Sixth Circuit similarly concluded that certain propositions upon which the analysis of the report was based were so questionable as

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[2]The Urban Markets Report itself stated: "There were a number of cases where data was inadequate or unavailable for the purpose of this study. Some of the data needed was scarce or non-existent, particularly, on the extent of purchases from minorities." Urban Markets report, Record Exhibit 19(B), p. x.

to "seriously undermine" the validity of the conclusions reached by that report.[3] Court of Appeals opinion, p. 593, n. 10.

2. Executive Action

The documents reflecting the executive action leading up to the enactment of P.A. 428 also fail to establish the existence of any identified discrimination. Indeed, those documents primarily make sweeping statements concerning societal disparities or address themselves to the problems of small businesses generally rather than of minority businesses in particular. The history of P.A. 428 is clear in this regard:

- July 28, 1975. The Governor issues an Executive Directive regarding Small Business Activities, discussing only general societal disparities: "Minority businesses have *historically* had greater difficulty getting into the mainstream of our American business enterprise system." The Governor establishes a task force designed to benefit *all* small businesses. Record Exhibit 19(D).

- March, 1976. The Task Force on Small Business Participation issues its Final Report. The report identifies problems and makes recommendations regarding minority businesses and *all small businesses in general.* The document contains no discussion of intentional discrimination. The document also states that "Measurement of existing minority business participation in state procurement is extremely difficult at this time. No mechanism exists for identifying those firms which now participate in state procurement by ownership characteristics." Record Exhibit 19(C).

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[3]The report is also interesting in that it only recommends implementation of the following: (1) a declaration of a policy defining the state's position on minority procurement; (2) communication of purchasing information to minority vendors; (3) dissemination of information on minority vendors to state buyers (4) establishment of a minority state purchasing organization; (5) collection of data on minority procurement; and (6) a set of goals and objectives. Urban Markets report, Record Exhibit 19(B), pp. 75-81. These "goals," "objectives," and "recommendations" hardly indicate that a mandatory, discriminatory set-aside quota is necessary to achieve the same ends.

- September 21, 1976. The Governor issues an Executive Directive establishing the Small and Minority Business Procurement Council. The Directive discusses problems common to all *small and minority* businesses. The Directive further requests the Council to define "minority." Record Exhibits 19(D), 46(B).

- January, 1978. The Small and Minority Business Council issues its First Annual Report. The Report addresses problems common to all small businesses and includes no discussion of intentional discrimination based upon race or sex. Record Exhibit 19(D).

This record of executive action is void of any documented, identified discrimination against minorities or women. *See* Court of Appeals opinion, pp. 592-593.

That the State's actions were aimed at a perceived underrepresentation of small and minority owned businesses rather than to remedy identified discrimination is clear from the statement at page 4 of the State's Jurisdictional Statement that: "None of these measures corrected the *under representation* of minority and women-owned businesses in state contracting."

3. Legislative History

When asked to disclose the information that the Michigan legislature relied on in making its "findings," Appellants provided a litany of historical and societal disparities:

> As a general matter, books, treatises, which pertain to the history of racial and ethnic minorities and females in western culture, including the history of the Western world for the past 2000 years, reflect and document discrimination based upon race, sex, and ethnic origin, which constitute the historical factual record *from which the legislature identified the problem which 1980 PA 428 was designed to remedy.*

See Court of Appeals Opinion, p. 594. Appellants referred to ancient laws that have imposed inferior status on minorities and women:

> Included in the historical record of which the legislature (upon information and belief) had knowledge, are the various laws and statutes of the United States and the State of Michigan which imposed inferior legal, social, and economic status upon racial minorities, females, and ethnic minorities. Specific reference is made to the Constitution of the United States, which imposed such status upon women, native Americans and racial minorities. Reference is also made to the several statutes of the State of Michigan which impose inferior status upon females in terms of their ability to acquire, maintain and dispose of property.

The State also referred to the enactment of remedial laws, including the statutory scheme upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980):

> Reference is also made to the legislature's knowledge or the conditions which gave rise to the passage in more recent times or federal and state laws and statutes designed to remedy the effects of past discrimination, including but not limited to the Thirteenth, Fourteenth, Fifteenth, and Twenty-First Amendments to the United States Constitution, 42 U.S.C. 1981-1986, 42 U.S.C. 2000a-2000h, the ten percent set aside contained in the Public Works Employment Act of 1977, 91 Stat. 116, which statute was upheld in the case of *Fullilove v. Klutznick*, 61 L.Ed. 2d 902.

Further, Appellants directed Appellees to a variety of proposed small business set-aside statutes that were not adopted. The text and history of the proposed legislation makes eminently clear that the perceived underrepresentation of minority businesses in state contracting was the result of factors *other than discrimination* — problems related to management, financing, market development, and Michigan's "sluggish economy." *See* Court of Appeals opinion, p. 591.

In sum, the record of this case is void of any findings of intentional discrimination that would justify the extraordinary response of a mandatory set-aside statute.

ARGUMENT

Appellants contend that the Court of Appeals committed three errors that warrant the review of this Court.

There is no error; there is no basis for review.

I.

APPELLANTS' CHALLENGE TO THE STANDARD APPLIED BY THE COURT OF APPEALS IS WITHOUT MERIT.

Appellants first argue that the Sixth Circuit erred by holding that the Michigan legislature "was required to '*prove* that the State of Michigan invidiously discriminated against racial and ethnic minorities in awarding state contracts.' " Court of Appeals opinion, p. 594 (emphasis added in Appellants' Jurisdictional Statement). Appellants place great emphasis upon the word "prove" and insist that this language creates a standard not reflected in the opinions of this Court.

This argument is completely unpersuasive. As an initial observation, Appellants certainly cannot contest the established principle that they bear the burden of proving that a compelling justification exists for this facially discriminatory statute. See ***Parham, Feeney,*** and ***Bakke, supra.*** The burden of proof is clearly allocated.

Moreover, Appellants' argument is based upon a plain mischaracterization of the opinion of the Sixth Circuit. In their Jurisdictional Statement, appellants protest as follows:

> The Sixth Circuit . . . errs in holding that Michigan was required to "prove" it had discriminated before enacting Public Act 428. Moreover, the Sixth Circuit also errs in applying judicial standards of review to a legislative determination . . .
>
> The State need only have "sufficient evidence to justify the conclusion that there has been prior discrimination," or "a firm basis for believing that remedial action is required."

Jurisdictional Statement, p. 15. The opinion of the Court of Appeals makes clear, however, what the Court meant when it used the term "prove":

> [T]his Court must decide whether the Michigan legislature, based upon the evidentiary factual record before it, "had a *firm basis* for believing that such action was required based upon prior discrimination" by the state itself. . .
>
> An examination of the evidence assertedly relied upon by the defendants in this action as support for their contention that the Michigan legislature had a *firm basis* for concluding that the state had engaged in discrimination in awarding contracts for goods and services clearly indicates that *Michigan had not developed material evidence to support a conclusion* that it had a compelling interest in adopting the racial and ethnic distinctions at issue in the case at bar. The defendants have relied upon certain conclusory historical resumes of unrelated legislative enactments and proposed enactments, executive reports, and a state funded private study conducted in 1974. This documentation is not reflective of discriminatory action by the State of Michigan.

Court of Appeals opinion, p. 590. The Court of Appeals concluded that the Michigan legislature "had little, if any, probative evidence before it that would warrant a finding that the State of Michigan had discriminated against [minority businesses] in awarding state contracts for the purchase of goods and services." Court of Appeals opinion, p. 594. With regard to the preference according to women-owned businesses, the Court of Appeals found the evidence non-existent. Court of Appeals opinion, p. 595.

The Court of Appeals did not impose any severe or prohibited burden of proof upon Appellants in this case. Indeed, it appears that the Court only placed upon Appellants precisely the burden of proof that Appellants advocate in their Jurisdictional Statement. The Court of Appeals concluded, however, that the purported "proof" offered by the state was, at best, not probative, and at worst, non-existent. The Court of Appeals' conclusion was clearly correct.

II.

THE COURT OF APPEALS EXERCISED PROPER REVIEW OF THE DISTRICT COURT DECISION.

Appellants' second claim of error is also spurious. In its Jurisdictional Statement, at pp. 17-18, Appellants essentially argue that the Sixth Circuit erred by failing to apply the "clearly erroneous" standard embodied in F.R.Civ.P. 52 to the factual findings of the district court.

The Rule 52 standard did not apply to the Court of Appeals review of the district court decision because the district court reached its findings predicated upon a misunderstanding of the governing rule of law. In its opinion upholding the constitutionality of PA 428, the District Court applied the "reasonableness" standard that was established in *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983). In *Bratton*, the court ruled that "the standard to be applied . . . [is] strict scrutiny." The *Bratton* court held, however, that cases involving claims of discrimination against members of the white majority "move against the grain" and, in such a context, strict scrutiny takes on a very different meaning. In short, *Bratton* reformulated the "strict scrutiny" standard in this context into a "rational basis" or "reasonableness" standard. The District Court in this case adopted the *Bratton* standard. See District Court opinion, p. 176.

In *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), a panel of the Sixth Circuit relied upon *Bratton* and adopted the "reasonableness" standard announced there. On May 19, 1986, this Court reversed the decision of the Sixth Circuit in *Wygant* and expressly rejected the *Bratton* standard. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) at 279 (Powell: "[The reasonableness] standard has no support in the decisions of this Court") and 283 (O'Connor: "[the 'reasonableness' test] is plainly incorrect under any of the standards articulated by this Court"). Based on *Wygant*, the Court of Appeals in the instant case disapproved the district court's application of the *Bratton* standard.

It is well settled that Rule 52 does not apply to findings based upon a misunderstanding of the governing rule of law. See, e.g., *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1983) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may in fact be so-called mixed findings of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law"); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323 (1974); and *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194, n.9 (1962). Having found that the District Court erred in adopting the *Bratton* standard, the Court of Appeals correctly applied the *Wygant* standard and adjudged the case thereunder.

Appellants' second assignment of error raises no question worthy of this Court's analysis.

III.

APPELLANTS' ARGUMENT THAT THE COURT OF APPEALS ERRED IN CONSIDERING THE ABSENCE OF FINDINGS OF DISCRIMINATION AGAINST THE DISTINCT FAVORED MINORITIES IS WITHOUT MERIT.

Finally, Appellants contend that the Sixth Circuit erred in holding that separate findings of prior, purposeful discrimination against distinct racial and ethnic groups are required.

As an initial observation, it should be noted that Appellants have again mischaracterized the opinion of the Court of Appeals. The "holding" that Appellants challenge as one of their three principle assignments of error is relegated to a footnote in the opinion of the Court of Appeals[4] and does not constitute a necessary logical step in that Court's analysis.

Further, the Court of Appeals could hardly be faulted for noting that the state has admitted that they had no information as to how many minorities in each of the favored minority groups actually bid for or were awarded state contracts. Appellants had the burden of establishing that the legislature had made sufficient findings of prior discrimination in the award of state contracts to warrant a racially predicated statute favoring anyone "who is black, Hispanic, Oriental, Eskimo, or an American Indian . . ." It is certainly relevant, in determining whether Appellants met their burden, to consider the fact that the state did not even know how many businesses existed that were owned by the favored minority groups.[5] As this Court held in *Fullilove v. Klutznick*, 448 U.S. 448, 497-498 (1980):

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[4]Court of Appeals opinion, p. 594-595, n. 14.

[5]Compare *Wygant*, 476 U.S. at 284 n. 13: "There is no explanation of why the Board chose to favor these particular minorities . . . Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups."

> [This] Court has never approved race-conscious remedies *absent* judicial, administrative, or legislative *findings of constitutional or statutory violations* . . .

Without data as to the existence or participation of the preferred classes it was simply impossible for the State to have made findings of constitutional or statutory violations.

IV.

THIS CASE AND THE *CROSON* CASE PRESENT DISSIMILAR ISSUES

Appellants argue that the instant case presents similar issues to those raised by *City of Richmond v. J.A. Croson Company,* No. 87-998, on appeal to this Court from the Court of Appeals for the Fourth Circuit. Although there are some superficial similarities between the two cases, the fundamental issues they present differ.

In *Croson,* the City Council of Richmond adopted a "Minority Business Utilization Plan" requiring contractors on city construction projects to subcontract at least thirty percent of the dollar value of the contract to minority-owned business enterprises unless the city waives the requirement.

In the instant case, majority contractors are precluded by the State from even submitting bids on State contracts. The State determines which projects it believes are appropriate for minority contractors and restricts bidding to minority contractors.

The Richmond ordinance in *Croson* requires majority contractors to "play ball" with minority sub-contractors; the Michigan statute forbids majority contractors from even "suiting-up."

This distinction between requiring all to participate versus excluding some from participation sets this case apart from *Croson.*

Also, the Richmond ordinance was adopted after a five-hour City Council meeting was conducted, during which the Council entertained a debate concerning the presence of invidious discrimination in contracting in Richmond. The question squarely presented by *Croson* is whether the testimony concerning conditions in Richmond elicited in the course of that debate suffices to warrant a finding of prior discrimination in the awarding of public contracts.

In the instant case, the State relied solely upon "evidence" of historical, societal discrimination occurring in the course of human civilization. The "proofs" offered by the State here simply

cannot suffice to justify a discriminatory statute; if they do, then there is no limitation whatsoever upon the adoption of such laws. Any community that qualifies as part of "the history of the Western world for the past 2000 years" (which is, of course, *any* community) also qualifies to adopt a discriminatory set-aside statute. This Court warned against such reasoning in *Wygant:*

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. *In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.*

Wygant, 476 U.S. at 276.

The divergence of the questions presented in *Croson* and those presented in the instant case indicates that each should be separately determined.

CONCLUSION

Appellants have raised no substantial question that would warrant this Court's review and have presented no meritorious challenge to the decision of the Court of Appeals.

This Court should therefore grant Appellee's Motion to Affirm.

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